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No. 95-971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD M. CONNELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE MILITARY'S BIFURCATED PROBATION REVOCATION SCHEME VIOLATE DUE PROCESS WHERE THE ACTUAL PROBATION REVOCATION HEARING IS PRESIDED OVER BY AN OFFICER WHO, BY VIRTUE OF HIS POSITION AS THE PROBATIONER'S COMMANDING OFFICER, IS NOT INHERENTLY NEUTRAL AND DETACHED?

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RICHARD M. CONNELL,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

The petitioner, Richard M. Connell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Armed Forces rendered in this case on September 22, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed

Forces[1] (Appendix A, *infra*) is reported at 42 M.J. 462. The opinion of the Navy-Marine Corps Court of Military Review[2] (Appendix B, *infra*) was unpublished.

JURISDICTION

The Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps Court of Military Review on September 22, 1995 (Appendix A, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Article 72, Uniform Code of Military Justice, 10 U.S.C. § 872 provides, in pertinent part:

> (a) Before the vacation of the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the

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[1] Formerly known as the Court of Military Appeals. For the sake of clarity, this Court will be referred to by its current name.

[2] Now known as the Navy-Marine Corps Court of Criminal Appeals. For the sake of clarity, this Court will be referred to by its former name.

> officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of the probation. The probationer shall be represented at the hearing by counsel if he so desires.
>
> (b) The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, any unexecuted part of the sentence, except a dismissal, shall be executed. . . .

The relevant portion of Rule for Court-Martial (R.C.M.) 1109 is set forth at Appendix C.

STATEMENT OF THE CASE

Petitioner was an active-duty enlisted sailor assigned to USS VINCENNES (CG-49) when he was tried by special court-martial, military judge alone, on August 11, 1992. He was found guilty of one specification of unauthorized absence and one specification of missing ship's movement, violations of 10 U.S.C. § 886 and § 887, respectively. He was sentenced to confinement for 90 days, forfeiture of $522.00 pay per month for 3 months, and a bad-conduct discharge.

After completing his sentence to confinement, petitioner commenced appellate leave on September 1,

1992.[3] Several weeks later, he was contacted by Captain T. C. McGinlay, Commanding Officer, USS VINCENNES, who offered him the chance to terminate his appellate leave, return to the Navy, and honorably complete his enlistment. Accordingly, he was recalled off appellate leave on October 13, 1992, some two weeks before Captain McGinlay, in his capacity as convening authority, approved the sentence as adjudged. However, Captain McGinlay suspended execution of the bad-conduct discharge for a period of twelve months, thereby placing petitioner in the functional equivalent of active-duty probation.

On November 20, 1992, petitioner received nonjudicial punishment, pursuant to Article 15 of the Uniform Code of Military Justice, 10 U.S.C. § 815, from Captain McGinlay in the latter's capacity as Commanding Officer of petitioner's ship. The offense underlying the nonjudicial punishment was a five-day unauthorized absence. This same offense formed the basis of a vacation hearing held on December 8, 1992, presided over by Captain McGinlay, as the petitioner's special court-martial convening authority. On December 18, 1992, Captain McGinlay recommended vacation of the suspension of petitioner's bad-conduct discharge. This recommendation was approved by the officer exercising general court-martial jurisdiction (Commander, Cruiser-Destroyer Group THREE), who issued a supplemental action on January 6, 1993, in which he vacated the suspension of the bad-conduct discharge. This vacation thereby revoked

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[3] Appellate leave is an active-duty, post-confinement, no-pay status for servicemembers whose courts-martial are pending review. While on appellate leave, servicemembers are free to reside wherever they choose within the United States.

petitioner's probationary status.

The Navy-Marine Corps Court of Military Review affirmed the findings and sentence as adjudged. *United States v. Connell*, No. 92-2547, slip op. (N.M.C.M.R. December 6, 1993). That Court found no systemic fault with the statutory requirement under Article 72, UCMJ, 10 U.S.C. § 872, that petitioner's special court-martial convening authority served as the presiding officer at the probation revocation hearing.

The Court of Appeals for the Armed Forces also affirmed petitioner's case, holding that there was no violation of petitioner's rights under the Due Process Clause of the Fifth Amendment. *United States v. Connell*, 42 M.J. 462 (1995).

REASON FOR GRANTING THE PETITION

The Military's Creation of a Bifurcated Probation Revocation Process Requiring a Hearing Conducted by an Officer Who is Not, By Virtue of His Position as Commanding Officer, Neutral and Detached Is a Structural Constitutional Defect Which Demands Immediate Attention.

A. Due Process Considerations Govern Both Civilian and Military Probation Revocation Hearings.

Petitioner's case provides good cause for review by this Court because it presents a significant constitutional issue: whether a military probationer's right to due process under the Fifth Amendment is violated by the requirement

that his special court-martial convening authority -- who is usually his Commanding Officer -- preside over his probation revocation hearing.

An individual whose sentence has been fully or partially suspended, whether that suspension extends to confinement or discharge, is deemed to be a probationer. Article 72, UCMJ. Indeed, due process is not affected by whether the underlying interest is a punitive discharge or actual confinement. *United States v. Connell*, 42 M.J. at 465. Because a service member, like his civilian counterpart, is "entitled to the due process of law guaranteed by the Fifth Amendment" to the Constitution, *Middendorf v. Henry*, 425 U.S. 25, 43 (1976), the military justice procedures for vacating suspended sentences must be examined within the due process framework of this Court's decisions in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

In *Morrissey*, this Court held that the minimum due process requirements for revocation were: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) *a "neutral and detached" hearing body, members of which need not be judicial officers or lawyers*; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. 408 U.S. at 489 (emphasis added). These due process protections were extended to probation revocation hearings in the Court's next term in *Gagnon*.

Article 72 of the Uniform Code of Military Justice and Rule for Court-Martial (R.C.M.) 1109 of the Manual for Courts-Martial afford essentially all of these protections to a member facing the vacation of a suspended sentence from a special court-martial *except for the specific right to a neutral and detached hearing body.* Instead, the military employs a unique bifurcated process for vacating suspended court-martial sentences. First, the officer exercising *special* court-martial jurisdiction over a military probationer (usually the probationer's commanding officer) personally holds a hearing on the alleged violation and forwards a written recommendation to the officer exercising *general* court-martial jurisdiction (OEGCMJ) over the probationer. The OEGCMJ, who is virtually always superior to the officer exercising *special* court-martial jurisdiction over the probationer, will then make the final determination as to whether to vacate the suspended portion of the sentence.

With one holding the hearing and the other basing his decision on the results of that hearing, the convening authority and the OEGCMJ "combine their efforts to perform the analogous task of the civilian parole board. . . ." *United States v. Brooks*, 14 M.J. 789, 794 (N.M.C.M.R. 1982).[4] The Court of Appeals for the Armed Forces has held that it was constitutionally permissible for the hearing function to be separate from the final decision-making function, so long as the final decision-maker made a written statement as to the evidence relied on and the reasons for revoking parole. *United*

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[4] In cases where an accused sentenced by a general court-martial does not have a special court-martial convening authority, the OEGCMJ functions as both the hearing officer and the final decision-maker. R.C.M. 1109(d)(1)(a).

States v. Bingham, 3 M.J. 119, 123 (C.M.A. 1977).

Since the bifurcated military probation revocation scheme is analogous to a civilian parole board, it is axiomatic that each tier of the bifurcated process must be as neutral and detached as a complete board. Petitioner does not contest the neutrality of the OEGCMJ who made the final decision as to revoking the suspension of petitioner's punitive discharge. However, petitioner does contend that a special court-martial convening authority is systemically disqualified from serving as the neutral and detached *hearing* body as envisioned by *Morrissey* and *Gagnon*.

B. The probation revocation hearing is a critical stage in the probation revocation process and must be presided over by a neutral and detached officer.

This Court has recognized that revocation hearings involve two analytically distinct stages. *See Black v. Romano*, 471 U.S. 606, 611 (1973); *Gagnon*, 411 U.S. at 784. The first stage is a factual determination of whether the probationer has violated one of the conditions of his probation, whereas the second stage is the determination of whether the violation warrants revocation considering the nature of the violation and the history of the probationer. *United States v. Morin*, 889 F.2d 328 (1st Cir. 1989). While both of these determinations are ultimately made by the OEGCMJ, he is required to make them based on the evidentiary record compiled by his subordinate, the probationer's commander, who is tasked with both conducting the hearing and forwarding a recommendation. The Court of Appeals for the Armed Forces, in reviewing

this issue in petitioner's case, apparently found an escape valve in the fact that the hearing officer and final decision-maker are two different parties. However, providing a neutral and detached ultimate decision-maker cannot "save" a process which is based on a hearing which is tainted by the deprivation of the probationer's right to due process.

An officer presiding over a military probation revocation hearing is a quasi-judicial officer whose duties cannot be delegated.[5] *Bingham*, 3 M.J. at 123. The general aim of requiring that certain officials be neutral and detached is to prevent such individuals from representing a law enforcement interest while at the same time engaging in a judicial or quasi-judicial function. *See generally United States v. Lopez*, 35 M.J. 35, 40 (C.M.A. 1992) (good faith exception to exclusionary rule applied to commander). Within the context of parole hearings, a "meaningful hearing requires a neutral and detached hearing body, one that is openminded. . . ." *Drayton v. McCall*, 584 F.2d 1208 (2d Cir. 1978). Accordingly, a military probation hearing officer -- although he is not the ultimate decisionmaker -- must be neutral and detached, open-minded and free from representing a law enforcement interest while executing his quasi-judicial functions. This is particularly true in light of the control over the hearing given to him under R.C.M. 1109.

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[5] The special court-martial convening authority was designated to conduct the revocation hearing *simply as a matter of convenience to the government. The Uniform Code of Military Justice: Hearing before the House Armed Services Committee, Subcommittee No. 1, on H.R. 2498*, 81st Congress, 1st Session (1949) (Statements by Mr. Felix Larkin, Asst. Gen. Counsel, Office of the Sec'y of Defense).

C. Because of command structure and conflicting interest, a convening authority is not per se "neutral and detached" in conducting a revocation hearing.

Military courts have long struggled with the tension inherent in a commander's ability to remain neutral and detached and his compelling interest in maintaining operational readiness and in ensuring good order and discipline. In fact, military courts have shown such uneasiness with the concept of the commanding officer as a "neutral and detached" entity that the current Chief Judge of the Court of Appeals for the Armed Forces has gone so far as to declare the phrase "neutral and detached commander" to be an oxymoron. *United States v. Rexroat*, 38 M.J. 292, 301 (C.M.A. 1993)(Cox, J., concurring). Nevertheless, military courts have found that commanding officers are not *per se* disqualified from serving as a neutral and detached magistrate for Fourth Amendment purposes, *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979), nor are they *per se* disqualified for making an initial probable cause determination for pretrial confinement. *Rexroat*, 38 M.J. at 297. This status can be lost, however, by overly-active involvement in a prosecutorial function. For example, a commander will no longer be neutral and detached for Fourth Amendment purposes if he becomes "personally involved as an active participant in the gathering of evidence or otherwise demonstrate[s] personal bias or involvement in the investigative or prosecutorial process against the accused. . . ." *Ezell*, 6 M.J. at 318.

However, the post-trial probation process differs from pretrial search and confinement issues in significant ways. Both a commander's decision to order a search and his decision to order pretrial confinement are subject to

review by a court-martial judge upon motion of the accused, whereas the decision to revoke probation will not be reviewed by a judicial authority until appellate review commences.

Moreover, by the time the actual hearing is conducted in a potential revocation case, the convening authority has already personally executed a number of acts instrumental to the court-martial process, including some which are prosecutorial in nature.[6] The convening authority appoints the court-martial members (as Captain McGinlay did personally in petitioner's case); refers the charges to the court-martial (as Captain McGinlay did personally in petitioner's case); in some instances (although not in petitioner's case), approves a pretrial agreement; and, depending upon the stage of post-trial review, takes initial action on petitioner's findings and sentence (as Captain McGinlay did personally in petitioner's case). Captain McGinlay went one step further in petitioner's case: he had already found petitioner guilty at a nonjudicial punishment hearing of the misconduct underlying the vacation hearing.

Further, it is difficult to envision any single official who is *less* "neutral and detached" concerning probation revocation than the special court-martial convening authority: he grants the probation, sets the terms of the probation, sets the conditions for vacation, and, in petitioner's case, had already punished the probationer for the underlying conduct. There is little protection in a probation system which the convening authority controls

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[6] For example, in referring the case to trial, the convening authority is functioning in a prosecutorial role. *United States v. Fernandez*, 24 M.J. 77 (C.M.A. 1987). *See generally Cooke v. Orser*, 12 M.J. 335, 338 (C.M.A. 1982).

almost single-handedly. The relationship between the "keeper and the kept" is one that "hardly is conducive to a truly adjudicatory performance." *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985) (qualified immunity from prisoner suits available to members of federal prison discipline committee responsible for hearing rule infraction cases).

Prior to petitioner's case, the military courts had apparently never directly addressed whether having the special court-martial convening authority conduct the revocation hearing satisfied the "neutral and detached hearing body" requirement in *Morrissey* and *Brewer*. However, the Court of Appeals for the Armed Forces' ruling in this case ignores concerns it expressed over fifteen years ago. In the context of vacating suspension of punishment awarded at an Article 15 hearing (a forum where neither a punitive discharge nor traditional confinement may be awarded), the Court of Appeals for the Armed Forces stated that "[I]t is uncertain that the commander who vacates the suspension [of punishment from an NJP] would be 'neutral and detached' within the meaning of the 'minimum requirements' on which petitioner relies [under *Morrissey* and *Gagnon*]." *United States v. Covington*, 10 M.J. 64, 67 (C.M.A. 1980).

Unlike a civilian judge or parole board, the special court-martial convening authority is usually the sole determiner of whether or not to hold a vacation hearing.[7] Furthermore, the broad interests of the civilian hearing

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[7] In fact, it is unlikely that a special court-martial convening authority would ever forward a recommendation to an OEGCMJ to *disapprove* vacation of a suspended sentence since the intent to hold the hearing originates with the special court-martial convening authority.

body are widely disparate from those of a ship's commanding officer; while the civilian judge has some general sense of responsibility for reducing crime on the streets, the commanding officer of a military unit carries ultimate accountability for good order and discipline within his unit. Nowhere is that concept more important than in the regimented confines of a ship. Also, while the failure of a civilian probationer to meet the conditions of his probation generally does not impact on a great number of people, within a military unit -- again especially on a ship -- a servicemember who is perceived to have become a disciplinary burden poses a very real threat to command morale and readiness. Nor is it very likely that a civilian judge would ever preside over a case in which he once held a prosecutorial interest.

The lower court accused petitioner of making "brash broadside on the sincerity and integrity" of the two officers involved in the revocation process. *Connell*, 42 M.J. at 466. However, such an accusation overlooks this Court's holding that the requirement of due process in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. *Tumey v. Ohio*, 273 U.S. 510, 532 (1926). For a commander to be so involved in the court-martial process, to decide to award clemency, to give nonjudicial punishment for an offense and then to use that nonjudicial punishment as the basis for a vacation is inherently suspect, however honestly that convening authority may attempt to serve.

This issue affects the due process rights of all military members, regardless of branch of service, who received a suspended sentence pursuant to a special court-martial. Where there is a variation in due process

protections, the Court of Appeals for the Armed Forces has stated that "[t]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976). Petitioner contends that there is no need to sacrifice due process rights for the sake of "military conditions" when the convening authority presides as a hearing officer solely as a matter of convenience.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 94-0486

CMR 92 2547

United States, *Appellee*

v.

Richard M. CONNELL, Seaman Recruit
U.S. Navy, *Appellant*

Argued Feb. 16, 1995

Decided Sep. 22, 1995

For Appellant: *Commander Mary T. Hall*, JAGC, USN (argued); *Commander Philip D. Cave*, JAGC, USN, and *Lieutenant Brian C. Lansing*, JAGC, USNR (on brief).

For Appellee: *Major Laura L. Scudder*, USMC (argued); *Commander S.A. Stallings*, JAGC, USN (on brief); *Colonel T.G. Hess*, USMC.

Opinion of the Court

WISS, Judge:

1. Pursuant to provident guilty pleas, a special court-martial, military judge alone, convicted appellant of absence without leave (AWOL) (59 days); and contrary to his pleas, convicted him of missing movement by design, *see* Arts. 86 and 87, Uniform Code of Military Justice, 10 USC §§ 886 and 887, respectively. The judge sentenced him to a bad-conduct discharge, confinement for 90 days, and forfeiture of $522.00 pay per month for 3 months. The convening authority approved these results, but he suspended execution of the punitive discharge for a period of 12 months in response to appellant's request for clemency. In due course, the Court of Military Review[1] affirmed in an unpublished opinion.

2. Prior to suspension of his punitive discharge, appellant returned to his ship from appellate leave. Within a month of his return, he again went AWOL for 5 days. Three days after his return from this AWOL, appellant's commander, who had been the convening authority of his special court-martial, imposed nonjudicial punishment on appellant for this absence. *See* Art. 15, UCMJ, 10 USC § 815; Hearing Officer Exhibit 3.

3. As well, the absence was the basis for subsequent proceedings to vacate the suspension. Pursuant to RCM 1109(d)(1),[2] this same special court-martial convening authority conducted an initial hearing on the alleged

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[1] *See* 41 MJ 213, 229 n.* (1994).

[2] Manual for Courts-Martial, United States, 1984.

violation of the conditions of suspension.[3] Acting on the basis of the report and recommendations of this officer, the general court-martial convening authority concluded that appellant had violated a condition of his suspension and that, accordingly, the suspension should be vacated. *See* RCM 1109(d)(2). He implemented this decision by a supplemental action on the court-martial.

4. In this Court, appellant questions whether his "due process rights under the Fifth Amendment were violated by the requirement that the convening authority serve as the hearing officer for a vacation hearing, and more particularly, by the personal interest exhibited by the convening authority in this case." 40 MJ 54.[4] We hold that appellant was not denied any due process and that the vacation of his suspended bad-conduct discharge was lawful.

I

5. RCM 1109 sets forth in detail the procedure that must be followed if a suspended execution of a court-martial sentence is to be vacated. Without unnecessary recital of minutae, suffice it here to note that, where the sentence is of a general court-martial or where it is of a special court-martial and includes a bad-conduct discharge (as here) there are three markers along the pathway.

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[3] RCM 1108(c) provides: "Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the code." Appellant acknowledged that his unauthorized absence violated this condition of his suspension.

[4] *See* 41 MJ 340 n.2 (1995), for disposition of the second granted issue (40 MJ 54).

6. The first is encountered if the probationer is placed in confinement incident to his alleged violation of the conditions of suspension and formal hearing on the alleged violation is not held within 7 days. RCM 1109(c)(4). Under these conditions, a "neutral and detached . . . hearing officer" must "determine whether there is probable cause to believe that the probationer violated the conditions of the" probation. RCM 1109(c)(4) and (C); *United States v. Bingham*, 3 MJ 119 (CMA 1977). In appellant's case, the suspension addressed a punitive discharge, and appellant had fully served his sentence to confinement, so he was not confined pending his vacation proceeding. Accordingly, this provision is not relevant here. *Id.* at 122-23.

7. The second requires "a hearing on the alleged violation of the conditions of suspension" that is to be held by the special court-martial convening authority "personally." RCM 1109(d)(1)(A). This provision implements the statutory mandate of Article 72(a), UCMJ, 10 USC § 872(a), that, before vacation of suspension of any general court-martial sentence or of a special court-martial sentence that includes as approved a bad-conduct discharge, "the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation." In this connection, a probationer enjoys due process that includes notice of the hearing; of the alleged violation; of the "right to be represented at the hearing by civilian counsel provided by the probationer or, upon request," by detailed military defense counsel; and of the "opportunity to be heard," to present his own evidence, and to "cross-examine adverse witnesses." RCM 1109(d)(1)(B).

8. The third prescribes a decision by the general court-

martial convening authority as to "whether the probationer violated a condition of suspension, and, if so, whether to vacate the suspended sentence." RCM 1109(d)(2)(A). That decision is based on the hearing officer's summarized record of the earlier proceeding and written recommendation concerning the vacation. RCM 1109(d)(1)(D). Again, both the report and recommendation of the special court-martial convening authority and the decision-making by the general court-martial convening authority are specific creatures of statute. *See* Art. 72(b).

9. Appellant makes no claim that his command did not follow these procedural steps. Rather, his two-pronged attack is on the procedure itself, both systemically and as particularly followed in his case. He contends: first, that constitutional due process requires that a probationer's hearing officer under Article 72(a) be "neutral and detached" and that a probationer's special court-martial convening authority cannot meet this standard as a matter of law--Final Brief at 11-16; second, even if this categorical assault fails, the special court-martial convening authority who served as appellant's hearing officer was too biased and personally interested to satisfy due process--Final Brief at 16-22. Thus, it is regarding these constitutional claims that we proceed with our review.

II

A

10. It has been settled for nearly 2 decades that a citizen in uniform is as "entitled to the due process of law guaranteed by the Fifth Amendment" as is his civilian counterpart. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976);

see also Weiss v. United States, ___ U.S. ___, 114 S.Ct. 752, 769, 127 L.Ed.2d 1, 25 (1994)(Ginsburg, J., concurring))("[M]en and women in the Armed Forces do not leave constitutional safeguards and judicial protections behind when they enter military service."). In the context of civilian parole or probation revocation proceedings, the Supreme Court has made clear that due process requires, *inter alia*, a revocation hearing by "a 'neutral and detached' hearing body such as a traditional parole board . . . " and "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *accord Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973).

11. This Court had occasion in *Bingham* to address these due process guarantees of *Morrissey* and *Gagnon* in the context of our system's proceeding to vacate a suspended sentence. *See also United States v. Rozycki*, 3 MJ 129 (CMA 1977). The Court noted that, unlike the usual situation in civilian systems, Article 72 provides that these hearing and decision functions are split between the probationer's special court-martial convening authority and the general court-martial convening authority. Nonetheless, the Court concluded "that it is constitutionally permissible for the . . . hearing function to be separate from the final decision-making function." *United States v. Bingham*, 3 MJ at 123. The question appellant poses here, then, is the next step in logical progression: Where those functions are split under Article 72, does *Morrissey*'s due process requirement for "a 'neutral and detached' hearing body" (¶ 10) apply only to the decision-maker (the general court-martial convening authority) or, as well, to the hearing officer (the special court-martial convening authority)?

12. In this case, we do not need to decide this broad

constitutional challenge, because we hold that appellant's special court-martial convening authority, who conducted his revocation hearing, met that standard. *See* Part III, *infra*. Before moving to that discussion, however, we are moved to offer brief comment on one aspect of the Government's argument relating to the foregoing.

B

13. To whatever extent *Morrissey* and *Gagnon* might fully apply in this respect to military suspension-revocation hearings, the Government attempts to distinguish those cases from this one on the basis of the nature of the interests at stake. Correctly, the Government points out that the two civilian cases involved liberty interests -- that is, the revocations there resulted in reincarceration; whereas, in the present case, "only [appellant's] bad-conduct discharge is at risk. . . ." -- an interest that the Government characterized as a "property interest." Answer to Final Brief at 4 and 5.

14. With this predicate as a springboard, the Government argues that the process that is due appellant and others like him is different. In this connection, the Government reminds us that the Supreme Court long has recognized that

> "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular

> situation demands." *Morrissey v. Brewer*, 408 US. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). . . .

Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

15. The Government's argument necessarily would lead to a different procedure where suspended confinement was in issue from where a suspended punitive discharge was on the line. Nothing in Article 72, however, indicates that the character of the procedure set forth there would depend upon the nature of the sentence that had been suspended. Further, we note that *Bingham* itself involved a suspended punitive discharge, not confinement; yet, the *Bingham* Court gave no suggestion that that factor was relevant in determining whether the elements of due process prescribed in *Morrissey* and *Gagnon* fully applied to Article 72's vacation procedures. *See also United States v. Rozycki, supra* (punitive discharge in issue).

16. Most important, however, is the Government's diminution of the nature of a punitive discharge. While not literally involving "liberty" in the sense of bars on the windows and doors, it certainly has certain points of comparison. We know, for instance, that a punitive discharge might lawfully be commuted into some length of confinement, *cf. Waller v. Swift*, 30 MJ 139 (CMA 1990), so in that regard it is quite closely akin to a liberty interest. *See* RCM 1107(d)(1) and Discussion. Further, unlike other interests to which the Government likens a punitive discharge as a "property interest," such a discharge -- which can result only from the sentence of a court-martial -- carries with it "the stigma and hardships of a criminal conviction. . . ." *See Mathews v. Eldridge*, 424 U.S. at 333.

17. Accordingly, if *Morrissey*'s mandate of due process requires that the hearing officer under Article 72 be "neutral and detached," like the decision-making function -- a question that we reserve for another day -- it would appear that the process is due whether the suspension was of confinement or of the execution of a punitive discharge.

III

A

18. This, then, brings us to appellant's contention that, *if* the hearing officer under Article 72 must be neutral and detached, "a probationer's special court-martial convening authority is not sufficiently 'neutral and detached' to serve as the hearing officer mandated by *Morrissey v. Brewer*" "[b]ecause of command structure and conflicting interests." Final Brief at 11. In other words, special courts-martial convening authorities cannot qualify as being "neutral and detached" for this purpose as a matter of law. *Cf. United States v. Covington*, 10 MJ 64, 67 (CMA 1980)("uncertain that the commander who vacates the suspension [of nonjudicial punishment] would be 'neutral and detached' within the meaning of the 'minimum requirements'" of due process).

19. Appellant recognizes that his position directly challenges the mandate of Congress in Article 72(a) that special courts-martial convening authorities personally perform the hearing function -- a duty that the *Bingham* Court held cannot lawfully be delegated. 3 MJ at 123-24. He brushes that aside, however, by reference to legislative hearings on this provision that indicate that this was done simply for the "convenience" of the Government. *See* Hearings on H.R. 2498 Before a Subcomm. of the House

Armed Services Comm., 81st Cong., 1st Sess. 1209 (1949). Final Brief at 8-9. Regardless, this Court will give deference to implicit determinations of Congress that statutorily prescribed procedures provide constitutionally satisfactory due process. *Cf. Cooke v. Orser*, 12 MJ 335, 338 (CMA 1982).

20. Even while making his bold and broad assertion, appellant acknowledges that "commanders are not *per se* disqualified from serving as neutral and detached decision-makers for initial pretrial confinement determinations and search authorization issues." Final Brief at 12. *See, e.g., United States v. Rexroat*, 38 MJ 292 (CMA 1993), *cert. denied*, 114 S.Ct. 1296 (1994); *United States v. Lopez*, 35 MJ 35 (CMA 1992). Minimizing the analogy between those roles and the one involved here, however, appellant points out that the former situations "involve pretrial proceedings where the validity of the commander's decision can be raised for examination under the crucible of trial." He argues that, on the other hand, "[s]uch protections do not exist for vacation hearings, where the only two 'checks and balances' are that the final decision is made by the officer exercising general court-martial jurisdiction (who, except for the most egregious cases, will support the recommendations of his subordinate commanders) and the appellate process, which offers only the possibility of relief months, if not years, later." Final Brief at 13.

21. Our view of those "checks and balances," however, is not so denigrating. Appellant has made no direct challenge to the neutrality and detachedness of the general court-martial convening authority so as to perform his statutory role in vacation proceedings. Moreover, that role actually is somewhat more than a mere check and balance;

after all, it is that official who actually *makes the decision* whether a condition of the suspension was violated and, if so, whether the suspension should be vacated. Appellant has offered no basis for his harsh broadside on the sincerity and integrity of these officers in fulfilling these responsibilities -- that they would unthinkingly follow the recommendations of their subordinates -- and it is worthy of no further consideration by this Court.

B

22. Left for our review is appellant's contention that, notwithstanding our discussion above, *his* special court-martial convening authority was not neutral and detached. He points out that this suspension was triggered by a call from this officer, his commander, "invit[ing appellant] to terminate his appellate leave status and return to the ship in order to finish his enlistment and earn a honorable discharge." Final Brief at 2. Additionally, upon appellant's return, several members of the command bent over backwards to smooth the way for him. He argues that this gave the commander a personal stake of sorts in appellant and that, when he disappointed that demonstration of faith by going AWOL a month after his return, the commander was too personally involved to be neutral and detached. Indeed, appellant casts his commander "in the image of the trusting and forgiving father who had been wronged by the ungrateful, wayward son." Final Brief at 18. *See generally United States v. Keith*, 3 USCMA 579, 583, 13 CR 135, 139 (1953) (commander has personal interest in case when accused violated personal order of commander).

23. To support his characterization of his commander, appellant refers to "numerous instances where [the

commander]'s objectivity as the presiding officer [of the vacation hearing] is suspect." He notes: "First and foremost" in this regard was the fact that, although the officer "had a legal advisor present," the officer himself called the witnesses, "conducted the examination" of them, and "interchangeably referred to himself in the first and third person." Final Brief at 19. Further, appellant contends that, "by the time [the commander] conducted the vacation hearing, the determination of the underlying misconduct was a 'done deal' because the Captain had just found appellant guilty of the same misconduct at nonjudicial punishment just a few weeks earlier." Final Brief at 19-20. *Cf. In re Murchison*, 349 U.S. 133 (1955)(condemned Michigan procedure that permitted a "one man grand jury" who later sat as judge at a contempt hearing arising out of the same grand jury proceeding -- the judge in that context had a personal interest in the outcome).

24. Appellant is correct, of course, that a particular commander who is charged with performing certain functions in the military justice system and who, in doing so, must be "neutral and detached" might fall short of that measure under the facts in a specific case. *See, e.g., United States v. Holloway*, 38 MJ 302 (CMA 1993); *United States v. Ezell*, 6 MJ 307 (CMA 1979); *United States v. Staggs*, 23 USCMA 111, 48 CMR 672 (1974). Indeed, this Court in *Rozycki* expressed concern whether a "fixed bias" of the special court-martial convening authority in that case was reflected in his report recommending vacation of the suspension of a punitive discharge. 3 MJ at 130.

25. Even if we had similar concerns here, several facts remain unchanged that assuage those concerns. First, "the

determination of the underlying misconduct was a 'done deal'" at the vacation hearing, *not* because the hearing officer had "just found appellant guilty of the same misconduct at nonjudicial punishment just a few weeks earlier." Rather, it was because appellant admitted his misconduct at that hearing, just as he had admitted it at the earlier nonjudicial punishment proceeding. *Cf. United States v. Lopez*, 35 MJ at 41 (commander not disqualified as "neutral and detached" when he "draw[s] on knowledge derived as part of routine administrative matters" and not out of revenge or vindictiveness). Second, whoever was the hearing officer, evidence of the command's supportive effort on appellant's behalf surely would have been revealed.

26. Finally, and in this context, it is virtually unthinkable that, with the underlying misconduct established, any hearing officer would have failed to recommend vacation of the suspension. After all, the court-martial had imposed the punitive discharge in the first place because of absence-type offenses (AWOL and missing movement by design). And here, 8 days after suspension of the execution of the discharge and after the command had exerted special effort to ensure appellant's successful return to duty, he again unlawfully absented himself from his ship.

27. In short, neither the evidentiary content of the hearing record nor the recommendation that followed is noteworthy as demonstrating the hearing officer's personal bias, as opposed to his acting in furtherance of his official interest. *See generally United States v. Jeter*, 35 MJ 442, 446 (CMA 1992)(The "accuser" concept of Article 1(9), UCMJ, 10 USC § 801(9), "protect[s] an accused from a vindictive" convening authority pursuing his "personal interest in the case and using his power as a convening

authority to obtain this result."). To some extent, we are reassured in this conclusion by the fact that, although represented by counsel, appellant voiced no objection to his commander's conducting the vacation hearing on the basis of a perceived bias, just as he had failed to do earlier in connection with the proceeding leading to nonjudicial punishment.

IV

The decision of the Untied States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD and GIERKE concur.

COX, Judge (concurring):

28. In my judgment, the interjection of the special court-martial convening authority into the process, between the servicemember and the general court-martial convening authority, provides a greater assurance of reliability and fairness than does the traditional judge-probationer hearing. *Cf. Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The Uniform Code of Military Justice provides the necessary framework to protect the servicemember from a vindictive revocation of a suspended sentence. Arts. 72(a) and 23(b), UCMJ, 10 USC §§ 872(a) and 823(b), respectively.

29. To me, the situation is analogous to the Anglo-Saxon, common-law tradition. There, the judge who imposes the probationary sentence is often called upon to decide if the probationer has violated the terms of probation. If there is reason to recuse oneself because of bias, prejudice, or pecuniary interest, then the judge cannot

sit. The same rule applies to each special court-martial convening authority. Arts. 72(a) and 23(b) of the Code.

30. I agree with the majority that the special court-martial convening authority who conducted the vacation proceedings here was not disqualified. Accordingly, I concur.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria, VA 22332-2400

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

ALBERT A. REED T.A. LAWRENCE
CLARKE C. BARNES

UNITED STATES

v.

Richard M. Connell, 102 68 2041
Seaman Recruit (E-1), U.S. Navy

NMCM 92 02547 Decided 6 December 1993

Sentence adjudged 11 August 1992. Military Judge: H.B. Smith. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS VINCENNES (CG 49), FPO AP 96682-1169.

CDR M.T. HALL, JAGC, USN, Appellate Defense Counsel

Maj LAURA L. SCUDDER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

We have examined the record of trial, the assignments of error,[1] and the Government's response, and we have

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[1] I. THE CONVENING AUTHORITY FAILED TO ISSUE APPELLANT ADEQUATE NOTICE UNDER R.C.M. 1108(C) OF THE CONDITIONS OF THE SUSPENSION OF APPELLANT'S BAD-CONDUCT DISCHARGE.

II. APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT WERE VIOLATED BY THE REQUIREMENT THAT THE CONVENING AUTHORITY SERVE AS THE HEARING OFFICER FOR A VACATION HEARING AND MORE PARTICULARLY, BY THE PERSONAL INTEREST EXHIBITED BY THE CONVENING AUTHORITY IN THIS CASE.

III. THE COURT-MARTIAL DID NOT HAVE JURISDICTION BECAUSE THE MILITARY JUDGE WAS NOT APPOINTED TO A FIXED TERM OF OFFICE. (CITATION OMITTED.)

IV. THIS COURT HAS NO JURISDICTION BECAUSE ITS JUDGES ARE NOT APPOINTED TO FIXED TERMS OF OFFICE. (CITATION OMITTED.)

V. APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. (CITATION OMITTED.)

VI. BECAUSE THE COURT'S JUDGES WERE APPOINTED IN VIOLATION OF THE APPOINTMENTS CLAUSE, THIS COURT HAS NO POWER TO REVIEW APPELLANT'S CASE. (CITATION OMITTED.)

concluded that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.

On 11 August 1992, upon mixed pleas, appellant was found guilty of unauthorized absence for a period of 61 days terminated by apprehension and missing ship's movement by design, in violation of Articles 86 and 87, Uniform Code of Military Justice (UCMJ), respectively. Appellant was sentenced by the military judge to confinement for 90 days, to forfeit $522.00 pay per month for 3 months and to be discharged from the naval service with a bad-conduct discharge. The convening authority approved the sentence, and, in response to appellant's request for clemency, suspended the bad-conduct discharge for 12 months. Accordingly, the appellant was recalled from appellate leave on 13 October 1992. It is apparent from the record that no written conditions of suspension were ever prepared, consequently, none was ever served on appellant, as prescribed by Rule for Courts-Martial (R.C.M.) 1108(c). Nor was there a pretrial agreement in which conditions of suspension could have been agreed upon and set forth in writing.

Appellant again absented himself from his unit on 12 November and remained absent without authority until 17 November 1992. This offense in violation of the UCMJ was admitted by appellant, and nonjudicial punishment was imposed on 20 November 1992. The offense also formed the basis for action to vacate the suspension. At a hearing on 8 December 1992 conducted by the convening authority, appellant admitted that his misconduct was a violation of the conditions under which he was permitted to return to active duty to complete his enlistment. Record at 4. By supplemental action taken by the offer exercising

general court-martial jurisdiction, the suspension was vacated.

R.C.M. 1108(c) provides in part that "unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the code." We have held that if the only condition would be the one implied by law, it is not necessary for the convening authority to notify the probationer of that condition. *See United States v. Mayville*, 32 M.J. 838 (N.M.C.M.R. 1991); *United States v. McCallum*, 31 M.J. 882 (N.M.C.M.R. 1990). Notification is certainly preferable.[2] The record clearly demonstrates that appellant understood, before he elected to absent himself again without authority, that violation of a punitive article of the code would be a violation of his probationary status. We find no prejudice.

As to appellant's second assignment of error we find no systemic fault with the procedures set forth in Article 72, UCMJ, as implemented by R.C.M. 1109. The officer exercising special court-martial jurisdiction is not, per se, disqualified to preside at a hearing to determine the justice and propriety of vacating an order suspending all or part of a sentence simply because he is the same officer who approve the suspension.

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[2] It is error to fail to reduce to writing the requirements which are to be imposed upon an accused who is granted a probationary period during which he may earn remission of a part of his sentence. Convening authorities should strictly comply with the mandates of R.C.M. 1108. Staff judge advocates should ensure that the commander is apprised of such requirements and provide the appropriate guidance and administrative support to ensure compliance.

The remaining assignments of error are without merit. *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2412 (1993); *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Mitchell*, 37 M.J. 903 (N.M.C.M.R. 1993)(en banc).

Accordingly, the findings of guilty and the sentence, as approved on review below, are affirmed.

APPENDIX C

MANUAL FOR COURTS-MARTIAL

Prescribed by Executive Order No. 12473.

April 13, 1984

Rule for Courts-Martial 1109. Vacation of suspension of sentence.

(a) *In general.* Suspension of execution of the sentence of a court-martial may be vacated for violation of the conditions of the suspension as provided in this rule.

. . .

(d) *Vacation of suspended general court-martial sentence or of a suspended special court-martial sentence including a bad-conduct discharge.*

(1) *Action by officer having special court-martial jurisdiction over probationer.*

(A) *In general.* Before vacation of the suspension of any general court-martial sentence, or of a special court-martial sentence which, as approved, includes a bad-conduct discharge, the officer having special court-martial jurisdiction over the probationer shall personally hold a hearing on the alleged violation of the conditions of suspension. If there is no officer having special court-martial jurisdiction over the accused, who is subordinate to the officer having general court-martial jurisdiction over the accused, the officer exercising general court-martial jurisdiction over the accused shall personally hold the

hearing under subsection (d)(1) of this rule. In such cases, subsection (d)(1)(D) of this rule shall not apply.

(B) *Notice to probationer.* Before the hearing the authority conducting the hearing shall cause the probationer to be notified in writing of:

(i) The time, place, and purpose of the hearing;

(ii) The right to be present at the hearing;

(iii) The alleged violation(s) of the conditions of suspension and the evidence expected to be relied on;

(iv) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(v) The opportunity to be heard, to present witnesses and other evidence, and the right to confront and cross-examine adverse witnesses unless the hearing officer determines that there is good cause for not allowing confrontation and cross-examination.

. . .

(D) *Record; recommendation.* The officer who conducts the vacation proceeding shall make a summarized record of the proceeding and forward the record and that officer's written recommendation concerning vacation to the officer exercising general court-martial jurisdiction over the probationer.

. . .

(2) *Action by officer having general court-martial jurisdiction over probationer.*

(A) *In general.* The officer exercising general court-martial jurisdiction over the probationer shall, based upon

the record produced by and the recommendation of the officer exercising special court-martial jurisdiction over the probationer, decide whether the probationer violated a condition of suspension, and, if so, whether to vacate the suspended sentence. If the officer exercising general court-martial jurisdiction decides to vacate, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating.